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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29-01-2007

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MR. JUSTICE M. JAICHANDREN

L.P.A.NO.70 OF 2002
and
C.M.P.NO.5411 OF 2002

1. Vaidiyanathan
2. G. Satanathan
3. G. Selvanathan
4. G. Aruljothi .. Appellants/ Plaintiffs

Vs.

P. Sambanda Mudaliar (died)
S/o. Subaraya Mudaliar

2. Govindammal
3. Vaidyanathan
4. Subbarayan
5. Ganesh @ Ganesan
6. Rajendran
7. Bhaskar
8. Sivakumar
9. Vijayalakshmi
10. Premkumari
11. Malika
12. Taiyalnayaki
13. Chandra
14. Sasikala
(Respondents 2 to 14 brought on record as LRs of the dead sole respondent vide order dated 22.8.2002 in CMP.No. 1118 of 2002. .. Respondents

Appeal filed under Clause 15 of the Letters Patent against the judgment of the learned single Judge dated 14.2.2002 in A.S.No.810 of 1987 allowing the appeal filed against the judgment and decree dated 30.4.1987 in O.S.No.45 of 1985, on the file of Sub Court, Cuddalore.

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For Appellants : Mr.K. Kannan

For Respondents 2 to 14 : Mr.M.S. Subramanian

J U D G M E N T

P.K. MISRA, J

Plaintiffs are the appellants against the reversing judgment.

2. The suit was filed for declaration that 'A' schedule property exclusively belongs to the plaintiffs or in alternative for partition of half share in 'B' schedule property of which 'A' schedule is a part. According to the plaintiffs' case, the properties originally belonged to two brothers, Palanivel and Chockalingam. Palanivel had two sons Narayanasamy and Manickam. The plaintiffs are the grandsons of Narayanasamy, being the son of Gnanasambandam. On 21.7.1912, in a partition, the properties described in 'A' schedule were allotted to Chockalingam and the properties described in 'B' schedule of the same document were allotted to Narayanasamy and Manickam, two sons of Palanivel. Out of 310 acres comprised in Survey No.67, which was dealt with in partition, after sale of certain portions, the total extent was reduced to 2.72 acres and in resettlement proceedings in 1922, the properties had been allotted and enjoyed by Narayanasamy and Manickam. On 5.4.1933, in a partition, 'A' schedule property was allotted to the share of Manickam as per Ex.A-39. The said property was sold by Manickam to one Appar Mudaliar on 11.9.1940 as per Ex.A-2. On 26.2.1942, the property purchased by Appar Mudaliar was sold in favour of Sambanda Mudaliar of Naduveerapattu (A petition for accepting such document dated 26.2.1942 as additional evidence has been filed in the present appeal). On 9.2.1950, the property purchased by Sambanda Mudaliar was sold to Narayanasamy as per Ex.A-3. After the death of Narayanasamy in 1965, the plaintiffs' branch entitled to whole of the said property. Chockalingam's share was sold in court auction and had been purchased by defendant's father. There was no delivery of possession pursuant to the court auction sale and at any rate the court's sale could confer right, title and interest of the judgment debtor, namely, Chockalingam's half interest, which was 1.36 acres, out of 2.72 acres recorded in the resettlement. This property was always used as house-site and there were no demarcation. In resettlement proceedings in 1976, the properties were converted from acres to hectares and now comprised in three patta numbers in the joint name of plaintiffs' father Sambanda Mudaliar and S.K. Velayudha Mudaliar. The plaintiffs' father was

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paying kist and house tax and the defendant has no right in 'A' schedule property and he is not entitled to any extent more than the Chockalingam's share. The defendant had also treated such property as if a joint family property of the defendant and the plaintiffs and in the partition among the defendant and his son only half share of the entire extent had been dealt with. On 5.11.1978, in a partition in the family of plaintiffs and their father, the suit property had been allotted to the share of the plaintiffs. Since the defendant attempted to trespass into South Western portion of the suit property and prevented the plaintiffs from demarcating, the suit had been filed for the reliefs claimed.

3. In the written statement filed by the defendant, the main allegations of the plaintiffs have been denied. According to the defendant, his father had purchased the entire extent in the Survey Number in court auction dated 21.12.1933, which was confirmed on 29.9.1934, and his father had taken delivery of possession and after his death, the defendant has continued to be in possession. In 1975, Sri Muthumariamman Temple had filed a suit against the defendant and Gnanasambanda Mudaliar, father of the plaintiffs, in respect of the said property. Such suit was dismissed on the ground that temple had no right and the defendant and his father were entitled to same. The appeal filed by the temple was also dismissed. Thus, the title of the defendant and his father had been upheld in a litigation, wherein the father of the plaintiffs was a co-defendant along with the defendant. Subsequently, the defendant had filed O.S.No.1290 of 1974 against S.K.V. High School and such school had also filed O.S.No.1289 of 1974 for declaration of their right. The father of the plaintiffs was the first defendant in O.S.No.1289 of 1974 filed by the school. After a joint trial in both the suits, the suit filed by the present defendant was decreed upholding his title and the suit filed by the school was dismissed. The appeal filed by the school against such decision was also dismissed. Validity of the sale deed dated 11.9.1940 and 9.2.1950 have been denied in the written statement. Similarly, the partition deed dated 5.11.1978 has been attacked as a fraudulent and collusive transaction. In all the earlier litigations, the defendant's title to the suit property has been upheld. It has been further stated that the defendant has not dealt with remaining 1.36 acres would not confer title on the plaintiffs and the defendant being in possession from 1933 continuously, has acquired right by adverse possession. Moreover, the suit is also barred by the principle of res judicata. The claim of joint possession is denied.

4. The trial court upholding the plea of the plaintiffs has granted alternative relief of partition. Appeal against such judgment and decree was filed by the defendant. Learned single Judge having reversed the decision of the trial court, the present appeal

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has been filed by the plaintiffs. An application has been filed for accepting document dated 26.2.1942 as additional evidence before the learned single Judge.

5. Learned single Judge has concluded that in the earlier litigations filed by third parties in respect of the entire property, the father of the plaintiff, who was a co-defendant along with the father of the present defendant, had either pleaded or given evidence to the effect that the entire property was purchased by the father of the defendant in court auction and the father of the defendant was in possession. Such disputes were decided by upholding the title of the father of the defendant and therefore by operation of principle of res judicata as well as estoppel, it can be said that the defendant and his father had right over the property and the plaintiff did not have any right. It is also found that the defendant and his father had remained in an uninterrupted possession and the defendant and his father had been asserting their right continuously and openly from 1933 onwards and unless the plaintiffs prove that they got possession subsequently, they cannot succeed and even if they had title, such title had been defeated by long adverse possession by the defendant.

6. Learned counsel appearing for the appellants has submitted that the question of any conflict regarding inter se title between the plaintiffs father and the defendant's father had not been in issue in any of the earlier litigation and, therefore, there is no question of attracting the principle of res judicata between the defendants. Similarly it has been contended that admission of the plaintiffs' father regarding the right of the defendant's father cannot operate as estoppel as it cannot be said that the defendant or his father had acted to his detriment on the basis of any admission and any such admission could be explained away. It has been further submitted that once a joint title is established, it is for the defendant to plead and prove that he has remained in exclusive possession with the exclusion of the plaintiffs, adverse to their interest for the requisite period, otherwise the question of acquiring right by adverse possession would not arise.

7. In JT 1995(3) S.C. 168 (MAHBOOB SAHAB v. SYED ISMAIL & OTHERS), it was observed :-

> " 8. Under these circumstances the question emerges whether the High Court was right in reversing the appellate decree on the doctrine of res judicata. At this juncture it may be relevant to mention that the trial court negatived the plea of res judicata as a preliminary issue. Though it was open to sustain the trial court decree on the basis of the doctrine of res judicata, it was not argued before the appellate court on its basis. Thereby the findings of the trial court that the decree in OS No. 3/1/1951 does not operate as res judicata became final. The question then

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is whether the doctrine of res judicata stands attracted to the facts in this case. It is true that under Section 11 CPC when the matter has been directly or substantially in issue in a former suit between the same parties or between parties under whom they or any of them claimed, litigating under the same title, the decree in the former suit would be res judicata between the plaintiff and the defendant or as between the co-plaintiffs or co-defendants. But for application of this doctrine between co-defendants four conditions must be satisfied, namely, that (1) there must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide the conflict in order to give the reliefs which the plaintiff claims; (3) the question between the defendants must have been finally decided; and (4) the co-defendants were necessary or proper parties in the former suit. This is the settled law as held in Syed Mohd. Saadat Ali Khan v. Mirza Wiquar Ali Beg; Shashibushan Prasad Mishra v. Babuji Rai; and Iftikhar Ahmed v. Syed Meharban Ali. Take for instance that if in a suit by A against B & C, the matter is directly and substantially in issue between B & C, and an adjudication upon that matter was necessary to determine the suit to grant relief to A; the adjudication would operate as res judicata in a subsequent suit between B & C in which either of them is plaintiff and the other defendant. In other words, if a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the court will try and decide the case, and the co-defendants will be bound by the decree. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other.

9. Where the above four conditions did not exist the decree does not operate as res judicata. It must, therefore, be that all the persons who have right, title and interest are made parties to the suit and that they should have knowledge that the right, title and interest would be in adjudication and the finding or the decree therein would operate as res judicata to their right, title and interest in the subject-matter of the former suit. Even in their absence a decree could be passed and it may be used as an evidence of the plaintiffs title either accepted or negatived therein. The doctrine of res judicata would apply even though the party against whom it is sought to be enforced, was not eo-nomine made a party nor entered appearance nor did he contest the question. The doctrine of res judicata must, however, be applied to co-defendants

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with great care and caution. The reason is that fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice. If a party obtains a decree from the court by practising fraud or collusion, he cannot be allowed to say that the matter is res judicata and cannot be reopened. There can also be no question of res judicata in a case where signs of fraud or collusion are transparently pregnant or apparent from the facts on record.

10. Therefore, in applying the doctrine of res judicata between co-defendants or co-plaintiffs, care must, of necessity, be taken by the courts to see that there must in fact be a conflict of interest between the co-defendants or co-plaintiffs concerned and it is necessary to decide the conflict in order to give relief which the plaintiff in the suit claimed and the question must have been directly and substantially in issue and was finally decided therein. As found by the appellate court, Maqdoom was playing fraud upon his creditors by creating false oral gifts or spurious claims of mortgages with a view to defraud them. Section 44 of the Evidence Act envisages that any party to a suit or proceeding may show that any judgment, order or decree, which is relevant under Section 40, 41 or 42 has been obtained by fraud or collusion. Under Section 40, the existence of the judgment, order or decree which by law prevents any court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such court ought to take cognizance of such suit or to hold such trial."

8. Similar view had earlier been taken in the decision of the Privy Council in A.I.R. 1931 Privy Council 114 (Mt. MUNNI BIBI AND ANOTHER v. TIRLOKI NATH AND OTHERS), while considering the doctrine of res judicata between the co-defendants.

9. More recently, similar views have been expressed in the decision of the Supreme Court in (2005) 6 SCC 304 (MAKHIJA CONSTRUCTION & ENGG. (P) LTD. v. INDORE DEVELOPMENT AUTHORITY AND OTHERS).

10. Keeping in view the aforesaid principles, it has to be examined whether the determination in the earlier two suits dismissing the suits of third parties against the father of the present plaintiffs as well as the father of the present defendant and upholding the title of the father of the present defendant would constitute res judicata.

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11. The materials on record relating to the earlier suits do not indicate that any question had been raised relating to the inter se right of the plaintiffs' father and the defendant's father in those suits. The main question was whether the third parties, who had claimed rights, were entitled to the property. Since the question of inter se title between the defendant's father and the plaintiffs' father was not in issue and was also not required to be decided in the disputes then raised, obviously the doctrine of res judicata cannot be applied between the co-defendants. The contention of the learned counsel for the appellants to the above extent is acceptable and the tentative conclusion of the learned single Judge that the earlier decisions operated as res judicata between the co-defendants cannot be accepted.

12. The next question is relating to the question of estoppel. It has been contended by the contesting defendant that the father of the plaintiffs had admitted either in the pleadings or in his deposition regarding title of the father of the defendant in the earlier litigations and, therefore, such an admission should be considered as binding.

13. It is no doubt true that admission is one of the best piece of evidence. However, admission can always be explained, unless such an admission give rise to the principle of estoppel. In the present case, the principle of estoppel does not arise because it cannot be said that the father of the defendant had acted to his detriment on the basis of the representation made by the plaintiffs' father. For attracting the principle of estoppel, the basic requirement is that the person to whom representation has been made must have acted on the basis of such representation and particularly to his own detriment. Moreover, since it can be said that the father of the defendant knew about the correct position and had not acted to his detriment, the question of estoppel may not arise. In the above context, the decisions of the Supreme Court in A.I.R. 1959 SC 504 (KISHORI LAL v. Mt. CHALTIBAI) and A.I.R. 1966 SC 605 (AMBIKA PRASAD THAKUR AND OTHERS v. RAM EKBAI RAI(dead) BY HIS LEGAL REPRESENTATIVES AND OTHERS) can be referred to.

14. In AIR 1959 SC 504 (cited supra) it was observed:-

> "14. . . . It was also submitted that the admissions shifted the onus on to the respondent on the principle that what a party himself admits to be true may reasonably be presumed to be so and until the presumption was rebutted, the fact admitted must be taken to be establish : Chandra Kunwar v. Narpat Singh, 34 Ind App 27. The question of onus loses its efficacy because it was never objected to in the Courts below and evidence having been led by the parties, at this stage the Court has to adjudicate on the material

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before it. And admissions are not conclusive, and unless they constitute estoppel, the maker is at liberty to prove that they were mistaken or were untrue. Trinidad Asphalt Company v. Coryat, 1896 A C 587. Admissions are mere pieces of evidence and if the truth of the matter is known to both parties the principle stated in Chandra Kunwar's case (34 Ind App 27) (supra) would be inapplicable. And in this case there is no admission by the respondent of the appellant's adoption by her husband in his lifetime. Such admissions that there are cannot help the case of the appellant or support a different appraisal of the evidence of the factum of adoption or establish an adoption which is otherwise disproved."

15. In AIR 1966 SC 605 (cited supra), the Subordinate Judge did not examine the basis of the plaintiffs' claim of title and his finding in favour of the plaintiffs' title was base chiefly on oral evidence, depositions of witnesses in previous litigations, possession and admission of the Maharaja. After analysing other aspects, the Supreme Court referred to the aspect relating to admission and observed :-

"(13) . . . The Maharaja was interested in the success of the suit, and it was necessary for him in his own interest to make this admission. The admission was made under somewhat suspicious circumstances at the end of the trial of the case when the arguments had begun. Though this petition was filed, the written statement of the Maharaja was never formally amended. In the circumstances, this admission has weak evidentiary value. In this suit, the plaintiffs do not claim tenancy right either by express grant or by adverse possession. Title cannot pass by mere admission. The plaintiffs now claim title under Cl.(1) of Section 4 of Regulation XI of 1825. The evidence on the record does not establish this claim."

16. In the present case, the claim of title by the defendant has to be examined by keeping in view the materials on record. Law is well settled that in an auction purchase the auction purchaser does not acquire any right over the property higher than that of the judgment debtor. Since the principle of res judicata between the co-defendants is not applicable and since mere admission, which does not operate as estoppel, does not create or pass any title, it cannot be said that the defendant's father had exclusive right over the entire property and on the other hand it is apparent that the defendant's father had right over the half interest in the property which he has purchased.

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17. The next question is whether the defendant had perfected his title by adverse possession. Once it is held that the auction purchaser only stepped into the shoes of the judgment debtor, who was a co-sharer, the auction purchaser can be held to be a co-sharer, who is entitled to possess separately by enforcing partition. The learned counsel for the defendant placed reliance upon the fact that there was some kind of delivery of possession and since in the previous litigations the plaintiffs predecessor-in-interest had admitted about the possession of the defendant or the defendant's father, it must be held that the defendant was in exclusive possession of the disputed property and, therefore, the plaintiffs or their predecessor-in-interest had lost title over the property.

18. In order to prove adverse possession, the defendant is required to prove that he or his predecessor-in-interest had possession over the entire property to the exclusion of the plaintiffs and their predecessor. There is no direct evidence on record that after auction purchase there was physical delivery of possession of the property by evicting all the persons. In the absence of any such specific proof, the only reasonable inference is that there was symbolical delivery of possession. This may be more particularly so because of the legal principle that auction purchaser is entitled to separate possession only after enforcing partition. It is of course true that at some point of time the plaintiffs' predecessor had admitted about the possession of the defendant. But the subsequent events and more particularly the documents on record clearly indicate that there was no exclusive possession of either party and on the other hand there was joint possession. This is apparent from Exs.A-7, A-8 and A-9, which are pattas in the name of Sambanda Mudaliar (original defendant) and Gnanasambanda Mudaliar, the predecessor in interest of the plaintiffs.

19. Apart from the above, the kist receipts and the house tax receipts are all in the name of the plaintiffs' predecessor. Similarly, Exs.A-41,A14 and A-19, tax demand receipts are in the name of the plaintiffs' predecessor . Coupled with the above, the materials on record indicate that when there was a partition in the family of the defendant, reference was only made to half extent of 2 acres 72 cents, which was dealt with in the partition deed dated 29.12.1971 Ex.A-44. Subsequently, in the partition after the death of Narayanasamy, 'A' schedule property has been subject matter of the division and allotment has been made in favour of the second plaintiff as per Ex.A-40. This subsequent event and including several documents clearly indicate that the defendant was not in exclusive possession. Since the defendant is raising the question of adverse possession, it was for him to prove by unimpeachable evidence that he was in exclusive possession to the exclusion of the plaintiffs and their predecessor. In the absence of any strong evidence on this aspect, keeping in view the documentary evidence on

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record, more particularly patta, rent receipts and the tax receipts, etc., it is difficult to accept the contention of the defendant / respondent regarding adverse possession.

20. Learned single Judge has merely referred to so called long possession of the defendant and upheld the contention relating to adverse possession without analysing in depth the various aspects and various materials on record. The strong evidence, which is required in support of the plea of adverse possession is singularly absent. The admission made by the plaintiffs' predecessor in interest regarding possession of the defendant and defendant's father is proved to be erroneous by virtue of subsequent conduct of both the parties as well as several documents on record. Those documents were available at a time when there was no dispute between the parties and, therefore, are of great value in coming to the conclusion that the defendant was not in exclusive possession. In view of the aforesaid conclusion, we are unable to sustain the decision of the learned single Judge.

21. For the aforesaid reasons, we allow the appeal and the decision of the learned single Judge is setaside and that of the trial court is restored. There would be no order as to costs.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

dpk

To

1. The Subordinate Judge,
Cuddalore.

2.The Record-keeper, V.R. Section, High Court, Madras.

1 cc to Mr.Ms. Subramanian, Advocate, Sr. 5688
1 cc to MR.R Yashod Vardhan, Advocate, sr. 5643

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